IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11044 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THUMMAR ANILKUMAR VALJIBHAI - Petitioner(s)

Versus

STATE OF GUJARAT & 4 - Respondent(s)

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Appearance :

MR NIKUNJ D BALAR for Petitioner(s) : 1,
MR DIPAN DESAI, AGP for Respondent(s) : 1,
None for Respondent(s) : 2 - 3, 5,
MR.SUBHASH G BAROT for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 25/01/2006

ORAL JUDGMENT

1. **Rule**. Mr. Desai, learned AGP waives notice of rule on behalf of respondent Nos. 1, 2 & 3 and Mr. Barot waives notice of rule for respondent Nos. 4 & 5.

2. After the order dated 21.01.2006 was passed, I would have considered the matter. However, Mr. Nanavati appearing with Mr. Balar, learned counsel for the petitioner submitted that the petitioner is not pressing the petition so far as the impugned order relates to termination of services of the petitioner and he also declared before the Court that the petitioner will leave the job or in alternative the school may be directed to terminate the services of the petitioner in pursuance to the order passed by the Commissioner of Schools and Mid Day Meal Scheme. However, he submitted that this Court may consider the matter for examining the legality and validity of the order passed by the authority directing to recover the amount of salary which is paid to the petitioner for the period during which, he worked as a teacher.

3. In view of the aforesaid statement, the matter is not required to be considered for examining the legality and validity of the order of termination or direction given by the the Commissioner of Schools and Mid Day Meal Scheme to the school authority for terminating the services of the petitioner on the ground that one of the Certificate of Bundelkhand University was not genuine and therefore consequently, the petitioner shall not be continued as a teacher in respondent No. 4 School from tomorrow onwards, i.e. 26.01.2006 and the said direction shall be complied with by respondent Nos. 1 & 4. It may also be recorded that on behalf of the School, there is no challenge to the order of termination. Mr. Barot has also left the matter to the Court qua the termination part is concerned and

therefore, there shall be also direction to the respondent Nos. 4 & 5 not to continue the petitioner as teacher in the school from tomorrow onwards.

4. The matter deserves to be considered for examining the validity of the order passed by the authority for recovery of the amount of salary paid to the petitioner for the period during which, he has worked as teacher. It may incidentally be mentioned that the said amount as communicated by the school comes to Rs. 5,69,842 for the period from 03.04.1999 till 25.01.2005 and thereafter, as the interim protection was granted, pending the litigation, the petitioner has continued till today and till tomorrow and therefore, the amount may be more.

5. The question, which may arise for consideration of this Court is as to whether the authority is justified in directing for recovery of the amount of the salary paid to the petitioner for the period during which he worked as teacher in the concerned School.

6. The contention raised on behalf of the respondent authority is that, as the appointment was obtained by fraud, the Government is justified in recovering the amount from the employee concerned even for the period during which he worked since the appointment was obtained by fraud.

7. Mr. Desai, alternatively submitted that in any case, it is the school which has joined hands with the petitioner in getting the appointment order for the post of teacher and therefore, the State Government

would be justified in taking the appropriate action against the concerned school for recovery of the amount from the grant as may be permissible since in the submission of Mr. Desai, the School is equally responsible for appointment of the petitioner as teacher on the basis of bogus or rather concocted degree of Bundelkhand University.

8. It is true that if the appointment is obtained by playing fraud, it may invite other legal proceedings against all concerned, may be the concerned employee or those who participated in the process of appointment, if such a case is found by the authority. However, so far as civil proceedings are concerned, the appointment if obtained on fraud, may consequently result into termination from service and if such a termination is effected, such employee cannot be continued in service but the wages, which are paid to the concerned employee for the period during which he actually discharged the duty cannot recovered by the employer as sought to be canvassed on behalf of the State Government. Even in the matter where the contract of employment is *void ab initio,* the Court may consider the matter for proper compensation to the parties who acted under such void contract with the belief that the contract is legal and valid. In a matter where the contract is voidable, the effect may start from the date on which it is established that the contract is illegal. In a matter where the employment is by fraud or misrepresentation, fact finding inquiry is required and if ultimately it is established that the employment was secured by playing fraud, employer may be entitled to terminate the services of such employee. If rules so permit, the

concerned employee may be suspended on prima facie detection of the fraud but then also during the period of suspension, subsistence allowance is required to be paid. In the event, final termination is effected, on account of the establishment of fraud, there cannot be further liability to pay the wages thereafter. However, it would be unreasonable to read the powers with the employer to recover the amount of salary/wages for the period during which the concerned employee has actually worked and he was neither suspended nor termination was effected prior thereto. As such, it can be said that the things have become irreversible, so far as the recovery of wages from the employee is concerned. When the appointment is obtained by fraud, the Civil Suit may be filed for paying the damages or compensation but the same is a different aspect. In the present case, the person has actually worked, the benefit is also obtained by the school of his services as teacher, and through the services of the person concerned as teacher, the obligation is also discharged by the school to the students concerned from whom the fee is collected by the School.

9. Therefore, even if the appointment which is subsequently found as obtained by fraud and is terminated, I find that wages which are already paid to the employee concerned for the period during which he actually worked or for the period during which the work was taken by the employer from the employee cannot be recovered as sought to be canvassed on behalf of the State Authorities. As such, under these circumstances, power to recover the amount of wages cannot be read with the employer. Even if the employer has to recover

any amount as compensation due to fraud, the employer may be required to file Civil Suit and in such Suit, the actual damages is required to be established to the satisfaction of the Court.

10.It deserves to be clarified that the aforesaid may apply only in the cases where the wages/salary are already paid and this may not be construed to enable the concerned employee to explore the additional benefit on the basis that the period during which he has actually worked should also be treated as for attracting other consequential benefits as if the service was valid like gratuity, counting of the period for pensionary benefits, leave etc.

11.Therefore, it appears that the order of the authority for recovering of the amount of salary from the petitioner for the period during which he actually worked as a teacher cannot be sustained in the eye of law and deserves to be quashed and set aside. It is als clarified that the petitioner would not be entitled to any additional benefit whatsoever for the period during which he has worked, except the salary already paid.

12.The alternative contention raised on behalf of the State Authority by Mr. Desai, learned AGP does not deserve to be examined at this stage because the proceedings are not initiated by the authority on the basis that the School has joined hands in playing fraud by the petitioner or that due to any lapse on the part of the School authority, the amount of salary or any percentage of grant is to be withheld or deducted. If such proceedings are initiated by the competent

authority, as may be permissible in law, the school may raise the defence as may be available to them. However, since the said aspect is outside the scope of the petition, the same cannot be considered in the present litigation.

13. In view of the above, the petition is partly allowed, subject to the above directions for putting an end to the services of the petitioner. Rule partly made absolute accordingly. Considering the facts and circumstances, there shall be no order as to cost.

14. The original documents, which were tendered by Mr. Barot, learned counsel for the School on 21.06.2006, shall be returned by the Registry to Shri Barot.

(JAYANT PATEL, J.)

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